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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Review of the Pioneer's
Preference Rules

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ET Docket No. 93-266

COMMENTS OF COX ENTERPRISES, INC.

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November 15, 1993

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SUMMARY

Cox Enterprises, Inc. ("Cox"), was selected by the Commission last October as one of three pioneers for its development of broadband, cable-based Personal Communications Service ("PCS"). In the interim, Congress passed revisions to the Communications Act that, among other things, required the Commission to implement competitive bidding procedures for certain spectrum.

The main focus of the Notice is a reassessment of the need for a preference program in a competitive bidding environment. Cox favors retention of the pioneer preference policy as it is consistent with legislative language in the revised Communications Act, consistent with legislative intent and has profound public interest benefits.

The Notice also requests comment on whether any repeal or amendment of the preference rules should apply to the broadband PCS tentative pioneer preference holders. The Notice concludes that the Commission should not subject MTel's narrowband PCS pioneer preference to any retroactive rule change, but raises the prospect of subjecting the broadband PCS pioneers to retroactive application of any repeal or change of the Commission's preference rules.

Cox submits that the Commission cannot rationally finalize MTel's nationwide narrowband PCS pioneer preference award while at the same time treating Cox's preference differently. There are serious administrative infirmities associated with the retroactive application of new rules that should militate against this approach.

There is no reason for the Commission not to finalize immediately broadband PCS preferences. The Commission has already delayed acting beyond the point contemplated in its current rules. Any amendments to the preference rules should only apply prospectively. Thus, there is no purpose served by further delaying the finalization of Cox's PCS preference award.

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Preference Rules)

COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby files comments in response to the Commission's Notice of Proposed Rulemaking ("Notice"), commencing a proceeding to reexamine the Pioneer Preference rules.^{1/} The Notice was initiated to assess the impact on the rules of the recent passage of the Omnibus Budget Reconciliation Act ("Reconciliation") that, among other things, authorized the Commission to assign licenses for qualifying radio spectrum by competitive bidding.

I. INTRODUCTION

The Commission's pioneer preference program was designed to ensure that those that had a better idea could have an opportunity to develop a new service or technology through the promise of a license. As discussed in more detail below, Cox's efforts in cable-based Personal Communications Services ("PCS") developments were undertaken in reliance on the availability of a preference award. Many entities spent much time and effort in PCS

1/ Pioneer's Preference Rules, FCC 93-477, released October 21, 1993.

experimentation and some were singled out for preference status because of their contribution to the advancement of PCS.

The promise of a preference induced an explosion of technical activity. Perhaps more than in any other service that the Commission has awarded pioneer preferences, the sheer breadth and scope of activity, imagination and entrepreneurship focused on the development of PCS has brought forth profound public interest benefits. The Commission is in a far better position now to resolve issues critical to licensing, service roll-out and technical aspects of the service as a result of reviewing numerous experimental progress reports and holding numerous staff meetings and information exchanges with interested PCS experimenters. The public already has and in the future will benefit from the promise of preferences. Because of experimental efforts attributable to the preference program, the United States will be ready, once PCS is launched, to reap the benefits of the substantial PCS development work sparked by the preference program.^{2/}

^{2/} It is important to note that many early PCS proposals focused on introducing services similar to the advanced cordless "telepoint" equipment introduced in the United Kingdom that met with massive consumer indifference in part due to its limited features. Advanced Wireless Communications, Inc., for example, proposed CT-2 testing with existing U.K. equipment modified to operate in the air-to-ground frequency bands, 849-851 MHz and 894-896 MHz. See AWCI experimental application filed December 4, 1990. It is primarily due to the continuing efforts of PCS experimenters such as Cox, who insisted on moving beyond introduction of limited telepoint service offerings, that the United States' version of PCS will have far more features and will be a more useful personal communications tool.

The Notice seeks comment on whether any amendment or repeal of the rules should apply to those tentative preference awards that are pending but not yet final. As American Personal Communications ("APC") has already pointed out, this places in limbo the tentative pioneer preferences awarded to Cox and two other PCS experimenters last October while the Commission concludes this current proceeding.^{3/}

Failure to finalize immediately the outstanding PCS pioneer preferences would be grossly unfair, unjust and arbitrary. Cox relied upon the Commission's tentative preference award to plan its commercial deployment of PCS in southern California. The Commission has adopted licensing and regulatory rules for PCS that are substantially harmonious with Cox's cable-based PCS vision and Cox's experimental work. To deny finalization of Cox's preference at this stage, while awarding a preference to MTel for its narrowband PCS development, is plainly unsupportable.

Additionally, the award of a licensing preference to Cox that is inadequate to develop Cox's full service, voice and data PCS vision so that it becomes a competitor to the telephone exchange carrier local loop, would be tantamount to not finalizing the preference award. Cox's consistently enunciated position on the appropriate size of markets for PCS licensed services and the

^{3/} See Request for Separate and Expedited Treatment of "Existing Pioneer Preference" Issues, American Personal Communications, filed October 28, 1993.

amount of spectrum necessary to develop PCS in a microwave incumbered frequency band is a matter of public record.^{4/}

II. THE COMMISSION HAS STATUTORY AUTHORITY TO AWARD PIONEER PREFERENCES CONSISTENT WITH COMPETITIVE BIDDING

A. The Commission Has Legal Authority to Award Preferences.

The Notice solicits comment on the Commission's continuing ability to award pioneer preferences consistent with the use of competitive bidding for spectrum licenses. Review of the Reconciliation and its legislative history leave no doubt that the Commission continues to enjoy full discretion to award pioneer preference licenses.

The Notice cites the relevant language endorsing the Commission's authority to retain the preference program contained in the Reconciliation:

nothing in this subsection, or in the use of competitive bidding shall . . . be construed to prevent the Commission from awarding licenses to those persons who make a significant contribution to the development of a new telecommunications service or technology.^{5/}

Although the Notice quotes legislative history in the House of Representatives that expresses neutrality toward the Commission's preference program, the Notice fails to account for another relevant portion of the legislative history of Section

^{4/} Cox has, however, proposed a compromise position in the event that the Commission determines that it should not award Cox a license on a frequency block covering less than the entire Los Angeles MTA. See Cox's September 28, 1993 letter to the Commission proposing a less than MTA-wide license (Attachment A). Cox is equally open to other potential compromises that accomplish its business plans and service goals.

^{5/} Reconciliation, § 6002 (j)(6)(G).

309(j)(6)(G) that includes the explanation for inclusion of this provision offered by the joint Senate-House Conference Report:

The FCC has been undertaking efforts to encourage the provision of new technologies and services by entrepreneurs and innovators. Consistent with the FCC's statutory obligation and its prior efforts in this regard, the Committee included language in this subsection which states that nothing prevents the FCC from awarding licenses to companies or individuals who make significant contributions to the development of a new telecommunications service or technology.^{6/}

The language of the preference provision and its legislative history clearly confirm that award of a licensing preference within the competitive bidding context is authorized and clearly contemplated by Congress.

Review of the timing of the 2 GHz tentative preference awards and the enactment of the Reconciliation confirms that Congress was aware of the existence of the PCS preference awards and their possible impact on the Commission's implementation of competitive bidding procedures.^{7/} Based on this recognition, Congress proceeded legislatively to provide the Commission with a vehicle to move forward with its established preference program.^{8/} Congress

^{6/} Reconciliation Submissions of the Instructed Committees Pursuant to the Concurrent Resolution of the Budget, S. Rep. 103-36, 103 Cong., 1st Sess. 73 (1993) (emphasis added).

^{7/} The broadband PCS pioneer preference awards were made in October of 1992, over ten months prior to the enactment of the Reconciliation.

^{8/} Indeed, there was no ambiguity regarding the impact of the Commission's tentative award to Cox. In its Preference Order, the Commission stated: "if otherwise qualified Cox would be the only eligible applicant for one of the frequency blocks for an area that includes its requested service area . . ." Pioneer Preference Order, 8 FCC Rcd 7794, 7802 (1992) (footnote omitted).

clearly understood the Commission's often expressed intention not to grant pioneer preferences lightly and Congress' legislative solution retained for the Commission its prerogative to continue to award preferences as circumstances and new service developments warrant. There can be no serious dispute that the Commission has the legal authority to continue to award pioneer preferences while holding auctions for mutually exclusive applications.

B. As a Matter of Policy, the Commission Should Continue to Award Preferences.

The Notice observes that, with the advent of competitive bidding, an innovator "is now able to obtain directly a license if we authorize the requested service or technology and award licenses through competitive bidding" and that there may be no need to continue the policy.^{2/} The Notice assumes that an innovator can now rely upon its own financial resources or the resources of financial institutions and venture capitalists to capture a license. The Notice therefore suggests that innovators may not need any special consideration or Commission preference policy to assure an opportunity to participate in new services within the auction process.

Cox's own experience suggests that the preference program is a desirable public policy that should be maintained and utilized whenever the Commission determines that the award of a preference is warranted. There is simply no other assurance that technical or service innovation will be recognized

^{2/} Notice at ¶ 7.

by and funded in the financial marketplace, let alone that the timing of this recognition will coincide with the Commission's allocation of spectrum and a license auction. Further, these misplaced assumptions overlook the societal value of encouraging new market entrants and the competition that is fostered by the maintenance of the pioneer preference program in the competitive bidding environment.

Finally, the Commission repeatedly has demonstrated that it does not and will not award preferences lightly and there is no suggestion in the Notice of fraud or abuse spawned by the program. As a policy matter, the Commission should maintain within its rules the flexibility to award preferences where, in the Commission's own judgment, they are merited.

C. No Retroactive Change in Policy Can Be Applied to the Tentative Preference Holders.

If the Commission ultimately determines that the preference program should be repealed or substantially modified in the future, Cox submits that the Commission cannot and should not, by its prospective decision to repeal or modify the program, retroactively apply these changes to Cox's preference. This is confirmed by the Commission's treatment of MTel, the narrowband PCS pioneer. The Commission anticipated the possibility of legislation containing spectrum auction authority, on June 24, 1993, but nevertheless finalized MTel's tentative preference award.^{10/} Treating Cox or the other PCS preference

^{10/} It is beyond dispute that the Commission was clearly aware of legislative (continued...)

holders differently for the sole reason that the Commission bifurcated its PCS proceeding and moved the narrowband PCS phase of the proceeding along a faster track would be arbitrary in the extreme.

Cox did nothing to delay the Commission's consideration of the finalization of its preference. To the contrary, Cox at every turn has urged the Commission to resolve outstanding PCS licensing issues and finalize its preference award. Penalizing Cox while at the same time finalizing the MTel preference would be arbitrary and capricious, particularly because the Commission retains the legal authority to continue awarding preferences and the Congress recently affirmed the value and viability of the preference program.^{11/} Finally, depriving the PCS tentative preference holders of the benefit of their investments will not encourage future investment in technological research and clearly will not build confidence in the Commission's commitment to follow through on similar promises in the future.

^{10/} (...continued)

proposals including the potential for competitive bidding and modifications to mobile carrier regulation. In the same order finalizing MTel's preference, the Commission specifically deferred the question of narrowband PCS regulatory structure, citing the potential for legislative change. See First Report and Order, GEN Docket No. 90-314 (FCC 93-329), adopted June 24, 1993, released July 23, 1993, ¶1 (1993).

^{11/} APC's Request quite properly pointed out that the timing of the Commission's preference award to MTel was entirely within the Commission's control, as was the timing of the Commission's 2 GHz PCS preference decision.

D. There Is No Element of Unfairness Or Unjust Enrichment that Should Persuade the Commission Not to Finalize Pending PCS Preferences.

The Notice reflects a misplaced concern that by awarding preferences the United States Treasury will be deprived of funds that Congress intended that the Commission collect from competitive bidding. In is uncontestable, however, that the Reconciliation legislation directs the Commission specifically not to formulate either new service rules or policies with the primary goal of revenue maximization.^{12/} This confirms that anticipated auction revenues (or a potential loss of auction revenues) is not to be the main, motivating factor in Commission policies, including the award of pioneer preferences.

Even with regard to revenue maximization, however, Cox submits the Commission should not be concerned. In PCS, the pioneering efforts of several parties have sparked the interest and imagination of many others. The pioneering work and demonstrations of feasibility and marketability increased dramatically the level of interest in PCS as a service and the level of expected public participation in the Commission's competitive bidding proceedings. As a result, the work of the pioneers in early and consistent PCS development has drawn others into the field and assisted in making the service attractive to

^{12/} The Reconciliation states "The Commission may not base a finding of public interest, convenience and necessity on the expectation of Federal Revenues from the use of a system of competitive bidding . . .". § 6002 (7)(A)(B), 107 Stat. 312, 390 (1993).

entrepreneurs.^{13/} This transformation may well offset any potential foregone revenue from award of a preference.

Congress obviously also intends that preferences may be granted without interfering with revenue raising objectives. If it were otherwise, Congress would not have explicitly inserted its preference language.

The Notice solicits comments on aspects of the petitions for reconsideration filed against the MTel preference that generally argue that the Commission's originally envisioned benefit of a preference is too great.^{14/} Cox disagrees with the suggestion in several petitions that award of a discounted payment or removal of the PCS pioneer from auction processing would constitute a form of unjust enrichment.^{15/} The problem with this argument is that it overlooks the early, significant and consistent investments of human, technical and financial resources that the pioneers expended in reliance on the Commission's invitation. The Commission and the public have profited from this exchange. While Cox is not suggesting that there be a dollar for dollar tradeoff, the pioneer's investment of time and talent is qualitatively different from those who, after following the Commission's rulemaking and analyzing the Commission's PCS

^{13/} Additionally, the Commission's experimental license disclosure requirements ensured that PCS pioneers shared substantial, timely information with the Commission staff and the public that would not otherwise have been made available.

^{14/} Notice at ¶ 10, n. 12.

^{15/} See e.g., Opposition and Comments on Petitions for Reconsideration and/or Clarification of Pagemart, Inc., filed October 25, 1993 at 7-10; Petition for Reconsideration of American Paging, Inc., filed October 25, 1993 at 2-4.

licensing rules and competitive bidding procedures, make a determination to bid for a license. The pioneers have already given a measure of what they should receive in return.

In addition, several petitioners in the MTel reconsideration suggest, presumably because they did not receive a preference, that the preference policy is somehow anti-competitive.^{16/} Cox submits, however, that the preference award of three licenses in broadband PCS will have a de minimis impact on the remaining two thousand five hundred plus broadband PCS spectrum licenses to be auctioned. Further, this is hardly the first time that Commission policies have provided predesignated entities with a benefit that was not extended to all qualified new service applicants.

In licensing cellular, for example, the Commission determined that the public interest in rapid deployment of cellular service would best be served by a wireline carrier set aside. In every cellular MSA and RSA market, the only eligible applicant on one of the two available frequency blocks was the wireline telephone company.^{17/}

^{16/} See Comments of American Paging at 3-4; Petition for Reconsideration of Pagemart, filed September 10, 1993 at 11-14.

^{17/} See Cellular Communications Systems, 89 FCC 2d 58 (1982); Cellular Lotteries, 98 FCC 2d 174, 192-199 (1984). When the Commission was provided with statutory authority to license cellular using lotteries, the Commission considered whether the new licensing method justified elimination of the wireline set aside. One of the factors cited by the Commission in its determination to continue the set-aside was the wireline carrier's reliance on the Commission's policy of reserving a license in each community for the telephone company. Id. at 192.

The Commission's adopted PCS licensing scheme provides the potential for seven additional mobile carriers within markets already served by two cellular carriers and SMR operators. The competitive harm that award of three pioneer preference licenses in non-contiguous markets could wreak on the competitive structure of the mobile market is not apparent.

III. APPLICATION OF RULE AMENDMENTS TO PCS PREFERENCE HOLDERS

As previously discussed, the Commission has the requisite legal authority to continue to award pioneer preferences. While the Commission is free to modify prospectively its preference rules and policies, it cannot and should not ignore or abandon those parties already found to justify a pioneer's benefit. No retroactive repeal or amendment of the preference rules should apply to the PCS tentative designees.^{18/}

In addition to the unfairness of changing the rules on parties that had no control over the Commission's docket calendar, Cox submits that justifiable reliance and equity require that the tentative PCS preference designees

^{18/} In order to retroactively apply rule changes, the Commission must have express statutory authority. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208-09 (1988); Brimstone R. Co. v. United States, 276 U.S. 104 (1928) ("The power to require readjustments for the past is drastic. It ... ought not to be extended so as to permit unreasonably harsh action without very plain words"). Reconciliation does not provide the Commission with this authority. To the contrary, the Reconciliation recognizes and approves of the Commission's pending pioneer preference determinations.

be awarded preferences consistent with the existing rules and the Commission's statutory authority.^{19/}

It is also critical that the spectrum block and the market size of the preference award be meaningfully related to the preference designee's business plan. Cox, for example, has consistently advocated the need for 40 MHz PCS spectrum blocks in order to initiate PCS service in spectrum laden with numerous incumbent microwave operators.^{20/} Further, Cox has sought in its PCS testing and developmental work to encourage equipment manufacturers to design PCS equipment that provides a full range of services to the PCS user. These features in some cases require broad bandwidths.^{21/}

The Commission's PCS licensing scheme divides licensed PCS spectrum into 30 MHz, 20 MHz and 10 MHz blocks, but permits aggregation of spectrum in any particular market up to a 40 MHz cap. Any spectrum Cox receives as its preference therefore will need to be augmented with additional spectrum in order for Cox to provide a viable service. The Commission must

^{19/} Consistent caselaw confirms the inequity of adopting rules with retroactive application. See Bowen, 488 U.S. at 208-09; Williams Natural Gas Co. v. F.E.R.C., 943 F.2d 1320 (D.C. Cir. 1991).

^{20/} Cox's studies of the microwave incumbency issue in the Los Angeles MTA confirm that it is among the most tightly congested microwave frequency bands in the United States.

^{21/} Additionally, Cox has tested and encouraged manufacturers to design cable-based PCS equipment for use in the 1850-1990 MHz band. Award of a preference license in a higher band would not only make Cox's full featured PCS vision impossible, it would place Cox in the ironic position of last place, awaiting the development of cost effective higher band equipment.

finalize a preference award to Cox that will permit it to aggregate spectrum within the 1850-1970 MHz band without running afoul of the aggregation cap. Finally, in awarding Cox a preference, the Commission must avoid an award that is inconsistent with Cox's full service PCS vision.^{22/}

IV. CONCLUSION

As discussed herein, Cox does not support repeal or retroactive modification of the Commission's pioneer preference policies as proposed in the Notice. Cox urges the Commission to reject the urge to throw the baby out with the bath water and change the benefits that were induced by the promise of a

^{22/} As Cox's September 28 letter to the Commission stated, award of a 20 MHz BTA license is insufficient to allow either spectrum aggregation or the development of full featured voice and data PCS service in southern California. See Attachment A at 4.

pioneer's preference. The 2 GHz PCS pioneer preferences should be finalized without any further delay.

Respectfully submitted,

COX ENTERPRISES, INC.


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November 15, 1993

ATTACHMENT A



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VIA HAND DELIVERY

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Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Personal Communications Services/Pioneer
Preference Issues; General Docket No. 90-314

Dear Chairman Quello and Commissioners Barrett and Duggan:

Cox Enterprises, Inc. ("Cox") was selected last October as one of three pioneers for its development of Personal Communications Services ("PCS"). In its decision, the Commission recognized that Cox's contributions in developing and demonstrating the feasibility of cable-based PCS merited a pioneer preference in the form of a Major Trading Area (MTA) license, assuming the Commission finalized Cox's preference and designated MTA markets for licensing.

Cox's extensive PCS experimentation, its analysis of the significant impediment to the development of PCS that will result because of incumbent microwave licensees, and its plan to provide a fully functional service, rather than niche PCS service, all demonstrate that 40 MHz of spectrum in the 1850-1990 Mhz range represents the minimum amount of spectrum necessary to bring a fully functional range of PCS to the public.^{1/} Likewise,

^{1/} The studies Cox performed of microwave congestion in the 1850-1990 MHz band confirm that PCS licensee blocks of 20 or 30 MHz will be effectively blocked from providing service in many critical areas of the Southern California market due to high concentrations of grandfathered microwave operations. Without sufficient spectrum to effect the timely implementation of service and avoid interference with incumbent microwave operations, this congestion and resulting blockage places PCS at a severe disadvantage in competing with more ubiquitously available mobile and portable radio telephone services that have fully unencumbered use of their license blocks. See Cox

(continued...)

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given the nature of the current mobile communications market, Cox believes that widespread service areas, such as MTAs, best reflect customer expectations for regional service.

The Commission's determination on September 23 to split available licensed PCS spectrum into seven separate blocks with disparate amounts of spectrum and size of markets in non-contiguous segments of the 2 GHz band reflects the Commission's desire to inject the maximum amount of competition into the mobile communications marketplace and allow parties to develop their disparate visions of PCS. Cox is encouraged that the Commission expressly maintained critical flexibility for market correction of its spectrum allocations and will allow PCS bidders and licensees to aggregate spectrum up to a 40 MHz cap.^{2/}

One Commissioner already has recognized the difficulty in reconciling the Commission's adopted licensing scheme with the tentative preferences the Commission awarded for meritorious development of PCS. Commissioner Barrett's dissenting statement observed that pioneers cannot easily be accommodated within the Commission's licensing plan without either rendering the Commission's preference program a eunuch or removing 20 MHz chunks of spectrum from preferred bidding or other procedures for minority and other parties that the Congress directed the Commission to consider along with pioneer preference holders.^{3/}

1/ (...continued)
Enterprises Inc.'s Reply Comments filed January 8, 1993, at 5-11 and Cox Enterprises Inc.'s First PCS Experimental Progress Report filed May 20, 1991.

2/ In a separate statement Commissioner Duggan observed that the PCS spectrum auction process proposed in a companion Notice of Proposed Rulemaking is intended "to let the marketplace correct any possible miscalculations on our part." Statement of Commissioner Ervin S. Duggan, News Release Report No. DC-2504, released September 23, 1993.

3/ Commissioner Barrett stated: "[t]he pioneer preference decision also is severely complicated by the scheme adopted today. Granting a pioneer preference to one of 2 MTA licensing opportunities has a significant preclusive effect that puts the policy at greater legal risk. On the other hand, only granting 1/10 MHz or 1/20 MHz BTA license to a pioneer preference selectee also appears ridiculous in terms of economic opportunity, and does not comport with the lobbying efforts of the tentative
(continued...)

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Cox urges the Commission to consider the following points as it deliberates on the appropriate market size and spectrum allocation for PCS pioneer preference holders. To award preferences of less than adequate spectrum for a relatively small license area transforms the Commission's laudable policy of encouraging entrepreneurial activity into a farce because it prevents those parties the Commission intended to reward as pioneers from providing the service they played a critical role in developing.

The Commission's promise to reward pioneers in the development of PCS has been an outstanding success; it has sparked unparalleled interest in the development of a new service that promises to revolutionize the way Americans communicate. Cox and other parties were encouraged to undertake and continue their efforts by the Commission's preference policy and its determination to award meaningful license awards to pioneers in other services.^{4/} Further, Congress acknowledged the value of the Commission's preference policy in its express statutory recognition of the Commission's discretion to award licensing preferences to innovators in lieu of mandatory competitive bidding.

To award a license that is not reasonably expected to permit the development of PCS would strangle the efficacy of the Commission's policy and would make a mockery of the Commission's claim that its preference program is designed "effectively to

3/ (...continued)

pioneer preference designees. Thus, under any scenario, we will find ourselves in a bind on this future decision as a result of the licensing structure adopted today. I believe that the policy could be sustained more easily by providing at least 3 major market opportunities, with a pioneer preference selectee awarded one of those 3 licenses." Dissenting Statement at 5 (footnote omitted).

4/ See Tentative Decision, 7 FCC 1625 (1992) (award to VITA of a nationwide preference for low earth orbit satellites); First Report and Order, Gen Docket 90-314 (FCC 93-329), adopted June 24, 1993, released July 23, 1993 (award to Mtel of a nationwide allocation to provide narrowband PCS); Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration CC Docket 92-297 (FCC 92-538) adopted December 10, 1992, released January 8, 1993 (award to Suite 12 Group of 1 GHz of spectrum for the largest market the Commission licenses for local multipoint distribution service).

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guarantee an otherwise qualified innovating party that it will be able to operate in the new service."^{5/}

Cox urges the Commission not to award PCS licensing preferences in a segment of the spectrum that has not been the subject of a preference holder's propagation tests, experiments or system development and where equipment is not yet under development.^{6/} Similarly, Cox urges the Commission not to award a preference that effectively precludes Cox from fully developing a service in the 1850-1990 MHz band, as would a 20 MHz BTA preference award.^{7/}

If the Commission nevertheless is convinced, for whatever reason, that award of a 30 MHz license based on a Major Trading Area market to a pioneer is inappropriate, Cox urges the Commission to examine another option that, while short of Cox's goal, would at least provide Cox with an opportunity to offer the type of widespread, full featured PCS service it consistently has espoused. The Commission could adjust a 30 MHz MTA grant to award two of the seven BTAs within the Los Angeles-San Diego metropolitan area to Cox. Such a result would allow the Commission to license five other 30 MHz BTA markets within the

5/ Pioneer Preference, 6 FCC Rcd at 3492. Indeed, a decision to deny PCS pioneers the opportunity to develop PCS will signal the end of the Commission's preference policy. No party will undertake the enormous risk of investing and developing new technologies and services if the Commission's ultimate award of a preference deprives the preference holder of a reasonable opportunity to provide its proposed service.

6/ Cox understands from its discussions with likely PCS equipment manufacturers that no equipment is under development for the 2120-2200 MHz blocks. While equipment unavailability may eventually be addressed, it would be ironic to force the same parties identified by the Commission as pioneers into a position of waiting for equipment while licensees without a preference in the 1850-1990 MHz band are already implementing service.

7/ Cox's spectrum utilization studies within the Los Angeles MTA demonstrate that microwave congestion will render a 20 MHz BTA block wholly inadequate, as a standalone, to provide full featured PCS. Using existing and anticipated technology, a 20 MHz BTA block cannot be combined with blocks in the 2120-2200 MHz block and the Commission's adopted cap of 40 MHz per licensee may operate to prevent bidding aggregation of the 20 MHz block (all of it, or smaller segments) with the 30 MHz MTA blocks.

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Los Angeles MTA using competitive bidding. Cox would anticipate seeking cooperative arrangements to provide seamless service with these additional BTA licensees.

Cox's efforts in developing cable-based PCS are a matter of record with the Commission. Cox undertook and continued its work in reliance on the Commission's articulated pioneer preference policy. The Commission selected Cox as a PCS pioneer. To deny pioneers like Cox the opportunity to develop the service they envision will send a discouraging message to enterprising companies and individuals and will make a mockery of the Commission's policy encouraging innovation.

Respectfully submitted,

COX ENTERPRISES, INC.


Alexander V. Netchvolodoff
Vice President Public Policy


James C. Kennedy
Chairman

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